

(1996) 04 MAD CK 0070

In the Madras High Court

Case No : Writ Appeal No's. 2160 to 2163/87, 313 to 316/88, 348 to 361/88, 763 to 767/88, 829 to 830/90

Union of India

APPELLANT

Vs

Goodyear India Ltd.

RESPONDENT

Date of Decision : 11-04-1996

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Central Excises and Salt Act, 1944 — Section 11B, 36
Customs Act, 1962 — Section 11B, 12, 27

Citation : (1997) 89 ELT 649

Hon'ble Judges : Srinivasan, J;S.M. Abdul Wahab, J

Bench : Division Bench

Advocate : Shri V.T. Gopalan, for Mr. S. Udaya Kumar, for the Appellant; Shri Habibullah Badsha, Senior Advocate for Shri. Raju K. Lukose and Shri M. Uttam Reddy and Mr. K.V. Prakash, for the Respondent

Judgement

Srinivasan, J.—These Writ Appeals have been taken up together at the request of all the Counsel, as common questions arise for consideration. The short facts necessary for the purpose of this Judgment are that the appellants imported natural rubber, known as smoked rubber sheets either directly or through the State Trading Corporation. The Customs Department insisted that the importers are liable to pay additional duty, as per Section 3(1) of the Customs Tariff Act, 1975. In several cases, the State Trading Corporation had paid the duty and collected from the importers and in such cases, the importers have sought for refund. In cases, where the importers had not already paid the duty, they have sought for either a declaration that the levy of duty is illegal or for a writ of mandamus, forbearing the Authorities from collecting such duty. The following Appeals arise out of the writ petitions, in which the prayer is for refund of the duty paid :

The other Writ Appeals arise out of the Writ Petitions for a declaration that the levy is illegal or for a writ of mandamus, forbearing the Authorities from

collecting the duty.

2. The learned Judge, who heard the Writ petitions has accepted the contentions of the petitioners in the writ petitions and allowed the same. The reasons given by the learned Judge are as follows :

1. The duty u/s 3(1) of the Customs Tariff Act, 1975 should be equal to excise duty for the time being leviable on a like article, if produced or manufactured in India. No duty has been levied on natural rubber under the Central Excises and Salt Act, 1944 for the reason that there is no such item in the first Schedule to the said Act and that by a notification under Rule 8(1) of the Central Excise Rules, all items under item 68 of the Schedule which were manufactured outside a factory did not invoke a levy of central excise;

2. There is no manufacturing process involved in bringing into existence natural rubber. Hence, no excise duty is leviable. In this regard, the facts set out in the affidavits filed in support of the writ petitions have not been rebutted in the counter affidavits filed by the Department. Further, the definition of natural rubber as found in the Encyclopaedia Britannica would include smoked rubber sheets and the definition makes it clear that no manufacturing process is involved;

3. Even as per the Tariff Advice dated 23-6-1981 issued by the Central Board of Excise and Customs, smoked rubber sheets are included in the items of natural rubber; and

4. u/s 11C of the Central Excises and Salt Act, a notification was issued, by which exemption was granted from duty for natural rubber including smoked rubber sheets for the period from 1-3-1975 to 7-7-1983.

On the aforesaid reasons, the writ petitions were allowed.

3. In these Appeals, the contentions urged on behalf of the appellants is that Section 3 of the Customs Tariff Act imposes additional duty equal to excise duty on the basis of the import made. In other words, it is said that the taxable event is import and the reference to excise duty is only to specify the measure of duty. It is not necessary according to the said Counsel that such an item should have been manufactured in India and duty levied thereon. Secondly, it is argued that the mere fact that the notification issued under the Central Excise Act has exempted the item from levy of duty will not absolve the importers from paying the duty, as they have factually imported the goods. Thirdly, it is contended that insofar as the petitions for refund are concerned, the two Acts, viz., Central Excises and Salt Act and the Customs Act have been amended, whereby Section 11(b) and 27 of the respective Acts were introduced with effect from 20-9-1991, prescribing a specific procedure for applications for refund. According to learned Counsel the only remedy available to the petitioners in the writ petitions is to approach the Authorities under the aforesaid two Sections, seeking refund and by following the procedure prescribed thereunder. Lastly, it is contended that the

writ petitions are not maintainable inasmuch as alternative efficacious remedies were available to the petitioners.

4. It is not necessary for us to set out the arguments urged on behalf of the respondents, as they are supporting the reasoning contained in the Judgment under Appeal.

5. Insofar as the first contention is concerned, reliance is placed on the Judgment of the Supreme Court in *Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others*, in which the Supreme Court held that the duty u/s 3(1) of the Customs Tariff Act is not the countervailing duty. In that Judgment it is held that the charging Section is Section 12 of the Customs Act, under which the duty of customs is leviable on the import and export of the article, which is relatable to Entry 83 in List 1 of the Seventh Schedule to the Constitution and that the taxable event is not the manufacture of goods, but the import. The Court observed that Section 3(1) of the Customs Tariff Act does not require that the imported article should be such as to be capable of being produced or manufactured in India, but the assumption has to be that an article imported in India can be produced or manufactured in India and upon that basis, the duty has got to be determined u/s 3(1) of the Customs Tariff Act. The following propositions were laid down in that Judgment among others :

.....

(1) The charging Section under which duties of customs are leviable is Section 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975.

(2) Additional duty which is mentioned in Section 3(1) of the Customs Tariff Act, 1975 partakes the same character as Customs duty since, it is in addition to the duty which is leviable u/s 12 of the Customs Act, 1962, the rates for which are prescribed by Section 2 of the Tariff Act, 1975. The duty mentioned in Section 3(1) of the Tariff Act, 1975 is not countervailing duty.

(3) Section 3(1) of the Tariff Act, 1975 provides a measure of the additional duty which has to be "equal to the excise duty" leviable on a like article if produced or manufactured in India, as defined in the Explanation to that Section. The measure of a tax or duty cannot determine its nature or character.

(4) The brass scrap which is imported into India by the appellants is liable to the levy of additional duty mentioned in Section 3(1) of the Tariff Act, 1975 because the taxable event is the import of the goods into India and not their manufacture.

(5) The duty referred to in Section 3(1) of the Tariff Act, 1975 is therefore, leviable even if the goods imported into India are not capable of being manufactured in India or are not in fact manufactured in India.

(6) The expression "excise duty" for the time being leviable on a like article if produced or manufactured in India which occurs in Section 3(1) of the Tariff Act, 1975 means excise duty for the time being in force which would be leviable on a

like article if produced or manufactured, in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs."

6. We are unable to understand how the said Judgment would help the appellants in this case. It has been held by the Supreme Court that Section 3(1) of the Customs Tariff Act prescribes only the measure of duty. But on the facts of that case, the Supreme Court has clearly pointed out that there was no dispute that for the brass scrap, which was the relevant goods, the excise duty was payable and the only controversy was to the rate of duty payable. In our opinion, the ruling of the Supreme Court cannot help the appellants.

7. In *Tata Exports Limited Vs. Union of India*, Justice Bhargava of Bombay High Court as he then was held that a notification under the Central Excise Act having exempted the drug in question in that case, the goods if manufactured in India would be exempted from the levy of excise duty and consequently, they were not leviable for the additional duty u/s 3(1) of the Customs Tariff Act.

8. In *Thermax Private Limited Vs. The Collector of Customs (Bombay)*, New Customs House, , the Supreme Court prescribed the relevant test to be applied in the following words "we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event". If that test is applied in the present case, there can be no doubt that the natural rubber would not have been subjected to any duty under the Central Excise Act, in view of the notifications issued thereunder.

9. Incidentally, our attention has also been drawn to a Judgment of the Supreme Court in *Hyderabad Industries Ltd. and Another Vs. Union of India (UOI) and Others*, . The Court held that the view expressed in *Khandelwal Metal & Engineering Works* requires reconsideration and referred the matter for the consideration of a Larger Bench. While doing so, the Court said :

"We have some difficulty in construing the Explanation to Section 3(1) of the Tariff Act in the manner adopted in the case of *Khandelwal Metal & Engineering Works*. The difficulty arises when the article which is imported has not been produced or manufactured. The Explanation says that the expression "excise duty for the time being leviable on a like article if produced or manufactured in India" in Section 3(1) means the excise duty that "would be leviable on the class or description of article to which the imported article belongs". Excise duty is leviable on the class or description of article to which the imported articles belongs if articles of that class or description are exigible to excise duty, having undergone production or manufacture. If they have not undergone production or manufacture they are not exigible to excise duty. Articles of that class or description of goods when imported are, then, not liable to additional duty. The assumption underlying the Explanation to Section 3(1) would appear to be that an imported article which is the result of production or manufacture can be

produced or manufactured in India; the emphasis in the assumption is on the words "In India". In other words, if the imported article is the result of production or manufacture, it must be assumed that it can be produced or manufactured in India. In this context the Statement of Objects and Reasons is relevant. It says that the levy of additional duty on an imported article is provided for to counterbalance the excise duty leviable on the like article made indigenously.

15. It may also be reconsidered why insofar as additional duty is concerned. Section 3 of the Tariff Act is not the charging Section. It provides for the levy, namely, additional duty; it provides for the taxable event, which is the import of goods that have been produced or manufactured; and it sets out the measure of the duty, which is the excise duty on the indigenously produced or made equivalent article. The Statement of Objects and Reasons is meaningful in the context because it says that Section 3 "provides for the levy of additional duty.....".

16. We are, therefore, of the view that the decision in the case of Khandelwal Metal & Engineering Works requires the consideration of a larger Bench. The papers and proceedings shall be placed before the Hon"ble Chief Justice for appropriate administrative directions....."

10. Insofar as natural rubber is concerned, the definition under the Encyclopaedia Britannica has been referred to by the learned Judge in his Judgment and it is not necessary for us to repeat the same. It is very clear that smoked rubber sheets will also fall under the category only and no manufacturing process is involved to bring them into existence. Further, under Rule 8(1) of the Central Excise Rules, a notification was issued in Notification No. 46/81-C.E., dated 1-3-1981 with effect from 1st April, 1981 in the following terms :

"In exercise of the powers conferred by Sub-Rule (1) of Rule 8 of the Central Excise Rules, and in supersession of the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No. 85/79-Central Excises, dated the 1st March, 1979, the Central Government hereby exempts all goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), other than goods manufactured in a factory, from the whole of the duty of excise leviable thereon."

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11. u/s 11C of the Central Excises and Salt Act, 1944, a notification was issued in Notification No. 291/86, dated 12-5-1986 in the following terms :

"In exercise of the powers conferred by Section 11C of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that according to a practice that was generally prevalent regarding levy of duty of excise, (including non-levy thereof), under the said Act, the duty of excise on

preserved latex, latex concentrates, smoked rubber sheets, crepe rubber, falling under item No. 68 of the First Schedule to the said Act, as it existed immediately before the commencement of the Central Excise Tariff Act, 1985 (5 of 1986), was not being levied u/s 3 of the first mentioned Act, during the period commencing on the 1st March, 1975 and ending with the 7th July, 1983, hereby directs that whole of the duty of excise payable under the first mentioned Act on such preserved latex, latex concentrates, smoked rubber sheets, crepe rubber and crump rubber, but for the said practice, shall not be required to be paid in respect of such preserved latex, latex concentrates, smoked rubber sheets, crepe rubber and crump rubber, on which the said duty of excise was not being levied during the period aforesaid in accordance with the said practice."

12. Thus, there can be no doubt whatever that no excise duty was payable on natural rubber even if it had been produced in India. Apart from the ruling of the Supreme Court referred to above, a look at the language of Section 3 of the Customs Tariff Act places the matter beyond doubt. The said Section uses the expression "equal to the excise duty for the time being leviable on a like article, if produced or manufactured in India." The Explanation to the said Section defines the expression, "the excise duty for the time being leviable on a like article if produced or manufactured in India", as meaning the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty. In this case, in view of the exemption referred to above, the excise duty leviable on the category viz., natural rubber was only zero during the relevant period. So, the additional duty which could be levied u/s 3 of the Customs Tariff act can if at all be only zero and nothing more than that. Hence, the Authorities are in error in seeking Tariff Act. These contentions urged on behalf of the writ petitioners are well founded and there is no difficulty in granting the declaration as prayed for by them that the levy is illegal or the mandamus, as prayed for by them forbearing the Authorities from collecting any additional duty on the imported natural rubber.

13. Now, we turn to the question of refund of duty already paid. We have already set out the numbers of the Appeals, in which that question has arisen. The contentions of the appellants that the only procedure to be followed by the persons who had paid the duty was to apply for refund u/s 11B of the Central Excise Act or u/s 27 of the Customs Act, as the case may be. It has been held by the Supreme Court that the said two sections are applicable even to pending proceedings. [See Union of India and others Vs. I.T.C. Limited, and Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others, .

14. That position is fairly conceded by learned Counsel for the respondents. However, he submits that in all cases, where the Writ Petitions are for a

mandamus, directing the Authorities to refund the duty already collected, the petitioners could be given an opportunity to apply for refund under the relevant provisions of the Customs Act before the concerned Authorities and the concerned Authorities may also be directed to consider such applications for refund. There can be no objection to such a course being adopted.

15. In some of the cases pursuant to the Judgment of the learned Judge, which is under Appeal during the pendency of the Appeals, when refund was insisted upon by the writ petitioners, the Court imposed a condition that the writ petitioners should furnish bank guarantee for one-half of the amount for getting such refund from the Authorities. It is said that in all cases security in the shape of bank guarantee was furnished for one-half of the amount and the other half of the refund amount was taken without furnishing such security. It is submitted by learned Counsel that in all such cases where the refund has already been collected by the writ petitioners, they need not be directed to re-deposit the amount collected by them with the authorities till the applications for refund already filed and to be filed by them are considered and disposal of by the concerned Authorities. According to learned Counsel in all such cases the bank guarantee already furnished by them may be directed to be kept in force till the disposal of such applications for refund. This suggestion, in our view is quite reasonable and fair and such a procedure can be adopted in the present case. In our opinion, it will be causing undue hardship, if the petitioners are now directed to re-deposit the amounts of refund already collected by them from the Authorities, particularly, in view of the fact that we have declared the levy to be illegal. But as pointed by the Supreme Court, the procedure for refund has to be adhered to by the said petitioners.

16. We are not prepared to accept the contentions urged by learned Counsel for the appellants that the writ petitions shall be dismissed on the ground that the petitioners had not availed of the alternative remedies available to them. Learned Counsel for the appellants referred to a Division Bench Judgment of this Court in *Collector of Customs, Madras Vs. Madras Electro Castings P. Ltd.*, and submitted that the writ petitioners could have obtained any other relief or the relief which they prayed for before the Authorities constituted under the Act themselves and there was no question of non-availability of an efficacious remedy under the provisions of the Act. But, as pointed out by learned Counsel for the respondents/writ petitioners, this Court has taken a view that existence of alternative remedy is not a bar to the entertainment of writ petitions (see *Union of India Vs. Pillaiyar Soda Factory*, . One of us sitting singly (Srinivasan, J.) expressed the same opinion in *Bush Boake Allen (India) Ltd. Vs. Union of India*, . It was pointed out in that case that the writ petition was pending for fourteen years and that there was no justification for dismissing the writ petitions on the ground of availability of alternative remedy and driving the petitioner to another forum. It was also observed that it will be grave injustice, if the petitioners were driven to work out their rights under the provisions of Section 36 of the Central Excise Act. Reference was also made to the decision in *Limenaph Chemicals Vs. Union of*

India, . In this case, the writ petitions have not only been entertained by this Court but have also been allowed by this Court. It can also be seen that the writ petitions were filed about fourteen or fifteen years ago. In the circumstances, it is not proper for this Bench to dismiss the writ petitions and direct the writ petitioners to avail themselves of the alternative remedy at this distance of time. It will cause grave injustice and undue hardship to them. Hence, we reject the said contention.

17. In the view we have expressed above, we do not think it necessary to refer to the other Judgments cited by learned Counsel appearing for both sides.

18. Taking the above facts into account, we dismiss the writ petitions in which the prayer is for directing refund of the duty already collected viz., Writ Petition Nos. 5665 and 5666 of 1981, 2879 of 1981, 1642 of 1983, 2880 of 1981, 10439 of 1981, 7779 of 1981, 6308 of 1981, 10440 of 1981, 7778 of 1981, 2993 of 1981, 1114 of 1982, 11123 of 1981 and 6575 of 1982 and allow the Writ Appeal Nos. 2161 and 2162 of 1987, 315 and 316 of 1988, 355 to 360 of 1988, 763 of 1988, 765 of 1988, 766 of 1988 and 830 of 1990. The writ petitioners are directed to file applications for refund of duty already paid, if they have not already filed such applications. The said applications for refund of duty shall be considered by the concerned Authorities in accordance with law and appropriate orders shall be passed within a period of six months from this date. Till the disposal of the applications for refund, the bank guarantees furnished by the writ petitioners pursuant to the orders of this Court in the Writ Appeals shall continue to be in force till the disposal of the refund applications. Writ Appeal Nos. 348 to 351 of 1988, 354 of 1988, 2160 of 1987, 2163 of 1987, 313 of 1988, 314 of 1988, 353 of 1988, 352 of 1988, 829 of 1990, 361 of 1988, 764 of 1988 and 767 of 1988 are dismissed. There will be no orders as to costs.